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Supreme Court of the United States.

OCTOBER TERM, A. D. 1900.

No. 115.

THE CITY OF LAMPASAS, PLAINTIFF IN ERROR,

vs.

JAMES M. BELL, DEFENDANT IN ERROR.

BRIEF FOR DEFENDANT IN ERROR.

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Supreme Court of the United States.

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THE CITY OF LAMPASAS, PLAINTIFF IN ERROR,

AGST.

JAMES M. BELL, DEFENDANT IN ERROR.

BRIEF FOR DEFENDANT IN ERROR.

Before reference is made to the statement of the case and other matters contained in the brief for the plaintiff in error, the defendant in error submits to the Court this preliminary point in answer to the contention of the plaintiff in error in support of its 1st, 2d, 3d and 4th assignments of error, which will be hereafter more fully considered, predicated upon the allegations as therein set forth that

Articles 340, 506 to 513 and 503 embraced in Title XVII. of the Revised Statutes of the State of Texas (the General Municipal Corporation Law of that State) are in violation of Sec. 1 of the 14th Amendment to the Constitution of the United States; and that, therefore, the bonds of a municipal corporation organized under such law and held by the defendant in error, *bona fide* and for value, are invalid, notwithstanding the fact that such bonds were issued under full statutory authority; were executed by the proper officials; were registered in the office of the State Comptroller; were endorsed with his certificate and were issued for the benefit of the municipality in payment for a system of water works which were built for and accepted by such municipality.

I.

The contention of the plaintiff in error is that, because the incorporation was by popular vote and no hearing was given to the residents of the territory included within the limits of the incorporation of 1883, they were (seventeen years ago) deprived of their property without due process of law, and that, therefore, the law was invalid and ineffectual to give corporate life or power to issue the bonds, and that the plaintiff in error, standing substantially in the place of the municipality creating the bonded indebtedness, is relieved from that indebtedness.

Aside from the first inquiry which at once arises—viz.: What right has the plaintiff in error to complain of the matters re-

ferred to?—it is submitted that the provisions of the statute were not in contravention of the specified prohibition of the Fourteenth Amendment.

A.

Whether a State law is violative of this provision must be determined by the inquiry whether it is in contravention (1) of the law of the land of the particular State whose law is called in question, or (2) of those fundamental rights of the individual which are within the protection of the Constitution of the United States.

Fallbrook Irrigation District vs. Bradley, 165 U. S., 112.

(1) That the provisions of the State statute here sought to be brought in question are not in contravention of the law of the land of the State of Texas is shown by the fact *(a)* that its enactment was specifically authorized by the Constitution of the State, which provides, in Article 11, Section 4 : " Cities and towns having a population of 10,000 inhabitants or less may be chartered alone by general law ; " *(b)* by the fact that the law has been upheld by the Supreme Court of the State of Texas (Graham vs. Greenville, 67 Texas, 62 ; State vs. Waxahachie, 81 Texas, 626) ; *(c)* by the fact that the law has existed for a quarter of a century ; has been acquiesced in by the people of the State as an appropriate and lawful exercise of legislative power, under which great numbers of municipal corporations have been created and vast property rights and interests have become vested.

(2) An examination of the law shows, it is submitted, that its provisions violated no constitutional rights. By the decision of the Courts of the State of Texas the law only permits the inclusion within corporate limits of urban lands. An inclusion of rural lands would render the incorporation void. The act only applies to actually settled towns and villages.

State vs. Eidson, 76 Texas, 302.

It is therefore to be observed that the case of People vs. Bennett, 29 Mich., 451, is not here applicable, for the reason that, as the law of Texas is construed by its Courts, the injustice complained of in People vs. Bennett does not exist.

The State of Texas long since adopted the method under this law by which the Legislature tendered to the inhabitants of these urban settlements the opportunity to determine by a majority vote of the electors of such settlements whether they would accept or reject a municipal charter within the boundaries of the urban settlements designated in a petition to be signed by a certain number of the inhabitants thereof. Referring to the provision allowing the annexation to a municipality of contiguous territory upon a majority vote of the persons residing in such contiguous territory,

Says WILLIE, C. Justice, in Graham vs. City of Greenville, 67 Texas, p. 65:

"But, while the legislature is not bound to obtain the assent of the persons residing within the contiguous territory before annexing it to a city, it may do so, and provide that the annexation shall not take place unless a majority of such persons shall assent thereto in some manner provided by the legislature. This is in no just sense a delegation of legislative powers, but merely a question of the acceptance or rejection of a charter" (1 Dillon on Municipal Corporations, Sec. 44, and authorities cited).

Says COOLEY on Constitutional Limitation:

"As municipal organizations are mere auxiliaries of the State government in the important business of municipal rule, the

Legislature may create them at will from its own views of propriety or necessity, and without consulting the parties interested, and it also possesses the like power to abolish them, without stopping to inquire what may be the desire of the corporators on that subject. Nevertheless, as the corporators have a special and peculiar interest in the terms and conditions of the charter, in the powers conferred and liabilities imposed, as well as in the general question whether they shall originally be or afterwards remain incorporated at all or not, and as the burdens of municipal government must rest upon their shoulders, and especially as by becoming incorporated they are held in law, to undertake to discharge the duties the charter imposes, it seems eminently proper that their voice should be heard on the question of their incorporation, and that their decisions should be conclusive unless for strong reasons of State policy or local necessity, it should seem important for the State to overrule the opinion of the local majority. The right to refer any legislation of this character to the people peculiarly interested does not seem to be questioned, and the reference is by no means unusual."

Cooley on Constitutional Limitations, pp. 138, 139, 6th ed.

It is, therefore, submitted that the method followed by the State of Texas in providing for the incorporation of settled towns and villages within urban boundaries determined by a majority vote of the inhabitants, was an appropriate exercise of legislative power in a matter peculiarly within State control.

Says Mr. Justice BREWER in Forsyth vs. Hammond, 166 U. S., 506 :

"The matter in controversy is peculiarly within the domain of State control. Kelly vs. Pittsburg, 104 U. S., 78 [26, 658]. It is for the State to determine its political subdivisions, the number and size of its municipal corporations and their terri-

torial extent. These are matters of a local nature, in which the nation, as a whole, is not interested, and which by the very nature of things the determination of the State authorities should be accepted as authoritative and controlling. We do not mean to hold that in the creation or change of municipal boundaries there may not be action taken by the State which involves a tresspass upon rights secured by the Federal Constitution; or that in proceedings looking to such change no questions can arise which are of a Federal nature, and in respect to which the judgment of the courts of the nation must be controlling. All that we mean to decide is that the matter of the territorial boundaries of a municipal corporation is local in its nature, and, as a rule, to be finally and absolutely determined by the authorities of the State."

Forsyth vs. Hammond, 166 U. S., 506.

In the case at bar no injustice is shown to have been perpetrated upon persons whose urban property was included in the corporate limits, and no fact presented, upon which can be predicated a claim that any wrong was done which would have been avoided by a judicial proceeding. The matter was decided by the popular will, with ample time for full discussion and consideration by the voters, and there is no evidence of any dissatisfaction with the result. Under these circumstances, it is submitted, no claim can be made that the case shows that the operation of the law was to invade fundamental rights.

The authorities relied upon in support of the contention of the defendant that a hearing should have been given are: Spencer vs. Merchant, 125 U. S., 345; Parsons vs. District of Columbia, 170 U. S., 45; Falbrook Irrigation District vs. Bradley, 164 U. S., 112.

It is submitted that the question presented by those cases differs in an essential element from that sought to be raised in the case at bar. In the cases referred to the lands were to be assessed for benefit to be derived from the particular improve-

ment provided for by the law ; unless the lands were to be benefitted they could not be justly included in the taxing district, and unless the Legislature itself defined the district, in which case it was presumed the question of benefit had been justly determined, and the determination of the district was left to subordinate agencies, it was held that the landowner was entitled to be heard upon the question whether his lands were to be benefitted. The question involved was necessarily a judicial question, involving private rights of property.

No such question, it is submitted, is presented in the case at bar. A municipal corporation is an instrument of government. Its organization is not predicated upon any benefits accruing to the property included within its territorial limits, but upon the benefits to the public from the organization of an arm of the government to administer certain powers of government over a certain territorial area. What territory is to be included within the scope of the authority of such governmental agency of the State and how the boundaries of such territory are to be determined it is submitted is a question of expediency with the Legislature of the State, and while judicial questions may grow out of such proceedings in which the protection of the constitution may be invoked for the preservation of fundamental rights, before a law can be condemned it must be shown in a given case, it is submitted, that it works grave injustice and imposes unjust and unlawful burdens, and such evidence is wanting in this case.

B.

But, further, it is submitted that the plaintiff in error is not entitled to raise the question of the unconstitutionality of the legislation referred to. Even if, in any view of the matter, that legislation could be regarded as an invasion of any rights of the individuals whose lands were included in the territorial limits of the municipal corporation issuing the bonds, such a

defense cannot be interposed by the plaintiff in error here. Seventeen years have passed since such incorporation and no person affected thereby has ever complained. All acquiesced; the statute of limitations has long since run. The matter cannot now be inquired into by those directly affected by the proceedings in question, much less by the plaintiff in error.

Says COOLEY:

"A party who has assented to his property being taken under a statute cannot afterwards object that the statute is in violation of a provision in the Constitution designed for the protection of private property" (Cooley's Statutory Limitations, p. 196, 6th Ed.).

Says the same author:

"A court will not listen to an objection made to the constitutionality of an act by a party whose rights it does not affect, and who has therefore no interest in defeating it."

Cooley's Stat. Limitations, 6th Ed., 196.
Supervisors vs. Stanley, 105 U. S., 305.
Clark vs. Kansas City, 176 U. S., pp. 114–118.

C.

The attention of the Court is called to the fact, as pointed out *infra*, page 6, of this brief, that all the question, presented by the assignments of error, with the exception of the constitutional question sought to be raised here, have been adjudicated against the plaintiff in error upon practically identical findings of fact in the suit brought on behalf of Mr. James Talcott, a holder of other bonds of the same issue above referred to, by the judgment of the U.S. Circuit Court of Appeals for the Fifth Circuit and which judgment, upon an application for a writ of *certiorari* in the month of May last, this Court declined to review.

City of Lampasas vs. Talcott, 94 Fed. Rep., 457. Same case 36 U. S. Circuit Court of Appeals, 38. Application for

writ of *certiorari* denied by this Court in May, 1900, 178 U. S., p. 612.

It was held in this case that plaintiff in error, standing substantantially in the place of the corporation issuing the bonds, was liable for the debt upon the bonds.

It is respectfully submitted that the precedent of this case should control the disposition of the case at bar, which further, it is submitted, is directly within the rule of Shapleigh vs. San Angelo, decided by this Court in May, 1896.

Shapleigh vs. San Angelo, 167 U. S., 646.
City of Lampasas vs. Talcott, 36 U. S. Circuit Ct. of Appeals.
Uralde vs. Spier, 33 U. S. Circuit Ct. of Appeals, 501, 38.
Mobile vs. Watson, 116 U. S., 289.

II.

The defendant in error, while admitting that the statement of the case contained in the brief for the plaintiff in error is substantially correct, desires to submit that in some of its details it is incorrect and the same is hereby controverted in the following particulars:

In the second and third paragraphs of the petition of defendant in error it was alleged that the City of Lampasas was a municipal corporation duly chartered under the laws of the State of Texas, and that as such it was authorized by its charter to construct waterworks and to issue bonds for the purpose of making such improvements; and in the fourth paragraph it was alleged that by virtue of the powers conferred upon it by its charter, and by the laws of the State of Texas, it passed the ordinance under which the bonds in suit were issued and sold,

and the substance of this ordinance was pleaded in the fourth paragraph. It was alleged that the bonds were duly registered by the treasurer of the City of Lampasas, by his signature endorsed thereon, and by the Comptroller of the State of Texas, and a certificate to that effect was endorsed thereon.

Plaintiff in error, in setting out the findings of fact and conclusions of law by the Circuit Court, omits the sixth finding, to the effect that the City of Lampasas, after the incorporation by vote of the people in 1883, became a thriving municipality with a population of about 5,000 during the years 1884 and 1885. The twenty-third finding is also omitted, wherein it appears that when the bonds in suit were presented to the Comptroller for registration a written statement was made by the Mayor and Secretary of the City of Lampasas certifying that the assessed value of all property situated within the limits of said city as shown by the tax rolls for the year 1884 was $1,447,200. In printing the 27th finding the fact that the stand pipe was located within the charter limits of 1883 is omitted, and defendant in error desires to add the 33d finding as showing affirmative proof by him that he had become the owner of the bonds, from which the coupons sued upon were detached, in the year 1887, prior to the institution of the *quo warranto* suit against Largen in 1889, as follows:

" 33rd. The plaintiff in 1887 obtained the bonds, the coupons of which are sued upon, from the estate of his father, who had purchased them from Nelson & Noel, brokers of St. Louis, Missouri."

We deem it proper also to state in this connection that this suit involved a part of the same bonds involved in the case of City of Lampasas vs. Talcott, in which a judgment in favor of Talcott, rendered by the Circuit Court for the Western District of Texas, was affirmed by the Circuit Court of Appeals for the Fifth Circuit, May 9, 1899. The opinion of said Circuit Court sustaining the validity of the bonds will be found in 94 Federal Reporter, page 457, and an attempt to remove the case to this court by *certiorari* was refused.

Defendant in error controverts the statement of his supplemental petition as made by plaintiff in error and for better knowledge of the facts and law therein presented will here print the same as follows:

1st. That if any question can arise as to which charter the City of Lampasas was acting under in January and March, 1885, when said city issued and placed upon the market its negotiable bonds and coupons, a part of which are herein sued upon, then this plaintiff says that said city had full authority under either charter to issue said bonds and coupons in this, that the special charter granted to defendant as pleaded by it expressly authorized defendant among other things to construct waterworks and to issue bonds to pay for such public improvements, and if it be held that the City of Lampasas as existing in 1885, does not now exist, a proposition which plaintiff denies, then plaintiff says that the mayor and city council which did issue such bonds, were acting in good faith as officers of the City of Lampasas, assuming full authority so to do, without dispute by the State of Texas, and as such were de facto officers of said city and acting as they did in the exercise of a power conferred upon them in said special charter, their acts bind the defendant now existing and the coupons sued upon are valid obligations of said defendant, and as such plaintiff prays judgment thereon.

2nd. For further special reply said plaintiff alleges that by the act of adopting the general charter in 1883 by vote of the people who resided and did business in said town or City of Lampasas and were citizens thereof following urban pursuits, such action on the part of the people by this act of exercising a delegated legislative power, thereby made such city a valid corporation under said general charter, notwithstanding the said special charter and that to the extent of the limits fixed in this general charter the City of Lampasas became and has ever since been a legally existing corporation and that all lands and property within said limits, are now within the jurisdiction of the City of Lampasas, and if de-

fendant's officers are not assuming jurisdiction over said entire limits that their failure so to do in no wise effects the validity of plaintiff's coupons, and he prays judgment establishing his said debt as against the corporation with the full limits existing in 1885, when said debt was created.

3rd. Plaintiff specially denies that the judgment of ouster pleaded by defendant as occurring in 1890 by the suit of the State vs. Largen, et al, has any binding force whatever, but is an absolute nullity because the holders of the waterworks bonds and of the coupons herein sued upon were not made parties to said suit, and because to give said judgment effect would be to declare that the state could destroy the corporation and with it the agencies existing when said contracts were made to assess and collect the special tax levied as part and parcel of said contract as a means of paying said bonds and coupons, and thereby impair the obligations of a contract in violation of the constitution of the United States and of the State of Texas; plaintiff prays judgment accordingly.

4th. Plaintiff further alleges that whatever may have been the legal effect of said judgment of ouster, the defendant City of Lampasas immediately after said Largen and others abandoned their said offices, proceeded to reorganize its city government under its said special charter, and that its mayor and city council again met on March 19th, 1890, for the first time under this reorganization, and on March 22nd, 1890, said city council duly passed a resolution to abandon said special charter and to adopt in lieu thereof the same general charter under which it had been acting from 1883, and that thereafter on December 26th, 1890, by proper vote duly and legally had and certified by persons living within what was known as the Lampasas Springs First and Second Additions to the town of Lampasas, the said city council added the principal part and substantially all of the inhabited portion of that part of the territory embraced within the incorporation of 1883, which was outside of the limits fixed in the charter of 1873. And plaintiff alleges that the business part

of the City of Lampasas has at all times been within the special charter limits of 1873, and that within this area nearly all persons living in said town, whether within the charter limits of 1883 or in the fifteen or twenty additions laid out into city lots, part of which are outside of said limits, have at all times done business following urban pursuits, and that after attaching the additions in December, 1890, fully ninety per cent of the population and a like large proportion of the tax values of said incorporation as existing from 1883 to 1890 were brought within the City of Lampasas as claimed by defendant, and there was also brought within said limits the system of waterworks, all bridges, graded streets and other property of said city government of 1883. Wherefor plaintiff says that by this act of reorganization and attaching additional territory, the City of Lampasas within this restricted area in any event became the lawful successor of said pre-existing de facto organization and as such succeeded to the ownership of said system of waterworks and its other properties and become bound for all of its debts including the coupons here sued upon and as such plaintiff prays judgment.

5. Plaintiff further alleges that whatever may have been the vice or irregularity in the adoption of the charter in 1883 by the vote of the people, the citizens and tax payers of said City of Lampasas acquiesced in the acts of their officers in constructing a system of waterworks and in issuing its negotiable bonds to pay for the same and that by such acquiescence in the act of their said officers all persons embraced in said limits became and are estopped to deny the validity of said bonds and that by permitting said corporation to exist and to issue its negotiable bonds in payment of a system of waterwork and by the registration thereof by its comptroller, the proper executive officer of the state appointed by law for such purpose, the State of Texas lost its right to interfere in any manner with said City of Lampasas in its proprietary or private rights connected with the ownership of said waterworks and its rights and duties to assess

and collect the taxes specially contracted to be levied to pay said bonds and that any attempt by the state to interfere therewith would be void as impairing the obligation of the contract and plaintiff here pleads that whatever effect the proceedings of ouster against Largen et al., may have been in other respects it has no binding force or effect as against plaintiff as the holder of its coupons connected with said bonds.

Plaintiff further alleges that at the first session of the legislature after the decision was rendered in the said Largen case, said legislature having full power and right so to do, did pass two acts in substance and effect validating all acts done by cities and city councils acting as de facto corporations and also validating their charters, and plaintiff here pleads said validating acts in aid of his said coupons and says the same validated and cured any vice or irregularity existing in defendant's charter of 1883, and that upon the passage of said acts defendant's officers were vested with full authority over all territory embraced in said charter of 1883, and now have such authority and should exercise the same in accordance with law and plaintiff prays judgment accordingly.

FIRST POINT.

It is respectfully submitted that this court is without jurisdiction of this case, because the attempt to raise the issue of the constitutionality of the general laws of Texas, by which all municipal corporations having less than 10,000 inhabitants are chartered, is a fictitious issue and is merely a colorable attempt to confer jurisdiction upon this court in order to overcome the unfavorable judgment of the Circuit Court of Appeals for the Fifth Circuit in the companion case of Talcott vs. City of Lampasas entered prior to the rendition of the judgment in this case.

The defendant in error does not question the right of this court to entertain jurisdiction if the issue of the constitutionality of the statute of Texas is properly drawn in issue, but

we contend, that the attempt to raise the issue of constitutionality of said general law is fictitious and colorable and that this court should not entertain jurisdiction of the case. (Penn. Mutual Life Insurance Company vs. City of Austin, 168 U. S., p. 695.)

That the validity of the bonds involved in this suit was directly in issue in the case of Talcott vs. City of Lampasas, it will be seen by comparison that the findings of fact contained in the record in this suit, so far as they are presented in the briefs of counsel for plaintiff in error, are identical with those presented in the Talcott case, with the additional statement in the 25th finding, that in the Talcott case it was not shown what bond was exhibited to Hedeman, in the present case, it is affirmatively found that none of the bonds of defendant in error were so presented, and furthermore, in the present case it was affirmatively shown that defendant in error had become the owner of his bonds in due course of trade prior to the time that the suit of the State vs. Largen was instituted.

While we do not desire to be considered as taking the absurd position that because this court may overrule the contention of the plaintiff in error as to the constitutionality of the statute that for that reason the court has not jurisdiction of the entire case, still we believe it is proper in considering the question as to whether the issue of constitutionality is real, or is merely colorable and fictitious, to call attention to our second point presenting that issue.

SECOND POINT.

The Constitution of the State of Texas which took effect April 18, 1876, having provided that cities and towns having a population of 10,000 inhabitants or less may be chartered alone by general law and the legislature having by act of March 15, 1875, enacted a general charter under which all municipalities in the state have been incorporated for a period of twenty-five years, and the highest court of the state having in many cases considered and approved of the said

legislative enactment, this court should not sustain the plea of unconstitutionality interposed by plaintiff in error.

In support of the foregoing proposition we submit the following:

By the Constitution of the State of Texas, Article 11, Section 4, it is provided, "Cities and towns having a population of 10,000 inhabitants or less may be chartered alone by general law."

Section 5 provides that "Cities having more than 10,000 inhabitants may have their charters granted or amended by special act of the legislature."

The above extracts are from the Constitution framed by the convention of 1875 which was adopted March 24, 1876 and took effect April 18, 1876.

Under previous constitutions many special charters had been granted to small towns and cities and on March 15, 1875, the legislature enacted a general charter which will be found on pages 113 to 156 of the acts of 1875. The title of this act was as follows: "An act regulating the incorporation of cities of 1000 inhabitants or over and to provide for the substitution and repeal of all acts heretofore passed incorporating such cities which may be in force by virtue of any existing charter."

In the codification of laws by official commission this act was incorporated in the Revised Statutes of 1879 as Title XVII under the head of "Cities and Towns." This law was continued in force by virtue of section 48 of article 16 of the general provisions of the Constitution of 1875 and it has remained in force with minor amendments up to the present time.

The first amendment to be adopted was the act of April 6, 1881, wherein it was provided, that when a town having 1000 inhabitants or over desired to incorporate it could be done upon the petition of fifty resident citizens in the same manner as provided for the incorporation of towns or villages with less than 1000 inhabitants. In other words under the act of 1875, made Title XVII of the Revised Statutes,

a defect was found in that no provision was made for the incorporation of what the law denominates a city of 1000 inhabitants or over, the law previously permitting only such corporations as were chartered by special act to surrender their existing charters and accept the general charter in lieu thereof and this amendment was made to remedy the defect. The next amendment was that of March 27, 1885, wherein it was provided that if the municipality was chartered as a town or village and not as a city, it could accept the general charter for cities of 1000 or over, when its population was sufficient. This amendment was enacted to cure the apparent defect in section 340 which extended the privilege of the general charter only to municipalities incorporated by the name of "*city*."

Article 340 as originally printed in the Revised Statutes of 1879 is identical with the first clause of article 340 as printed in the brief of plaintiff in error. The amendment of 1881 is contained is the second clause of said article. We call attention to the amendment of 1885 without printing it simply for the purpose of giving an historical account of the law and the amendments enacted to cure the defects therein as will appear from the different cases cited.

It will be seen that where a special charter had been granted to a city, the technical mode for surrendering the same and adopting the general charter, was by action of the city council and not by vote of the people. The first case to go before the Supreme Court of the state on this point was the case of State vs. Dunson (71 Texas, 65), decided June 12th, 1888, wherein the court held that because the City of Nacogdoches did not pursue the method pointed out and adopt the general charter by act of its city council, although it had attempted to do so by general vote of the people, that the incorporation was for that reason invalid. We copy the following extract from the opinion found on page 71:

"There is no doubt that the legislature might have provided that the inhabitants of an incorporated town might, by a majority vote, accept incorporation under the general

law as was done by the Act of January 27, 1858, and thereby repeal the former charter; and it would seem that this would be more in harmony with the spirit of our institution than is the mode provided by Article 340 of the Revised Statutes. This was, however, a matter for the consideration of the legislature and a town or city already incorporated and desiring to re-incorporate under the general law must, to accomplish that, follow the mode now prescribed."

The next case was that of Buford vs. State reported in 72 Texas, 182, and these cases were followed in the case of Largen vs. State (76 Texas, 323), which was an action to dissolve the corporation of the defendant in error, the City of Lampasas. These are the only three cases wherein there has been special charters granted by the legislature which had become dormant and in each it will appear, that there was an honest effort to adopt the general charter, by vote of the people, instead of following the technical and formal method pointed out, of reorganizing the dormant corporation by the election of a city council and have it adopt the general charter.

In the case of Harness vs. State (76 Texas, 566), the same principle was announced as applied to a municipality incorporated as a village and an attempt by it to abandon that incorporation and to incorporate as a city of 1000 inhabitants or over, prior to the amendment of 1885, which for the first time authorized such towns and villages to adopt the general charter for cities.

We desire to call the attention of this court to the declaration of the Supreme Court as found in that opinion on page 572:

"There is much confusion in the statutes providing for the incorporation of cities, towns and villages and their revision is required for the public welfare, but the courts have simply to enforce them as they are found. Municipal corporations can be created only in the manner provided by law and when created must continue until abolished in some legal method. We see no reason why it should not be provided that a vil-

lage corporation might give up its corporate existence in the very act of incorporating as a city under the provisions of Article 340 and 340a, Sayles' Civil Statutes, as well as by pursuing the course pointed out in the succeeding article, but the legislature has not seen proper to permit this to be done."

The next case which we desire to call to the court's attention is that of the State vs. Eidson (76 Texas, 302), which is the first authoritative construction placed by our Supreme Court upon what is meant by the power conferred upon the people of a town, village or city, to incorporate under this general law. That decision is in point, and as we contend controlling upon this court as to the constitutionality of the law. It will be seen that the Supreme Court of Texas holds that those who seek to incorporate a municipality must carefully observe the lines which mark the boundaries of the urban population. We quote from that part of the opinion found on page 305 as follows:

"It is only *towns* and *villages* authorized to incorporate under that chapter which are authorized to incorporate for school purposes only. (Sayles' Civ. Stats., Art. 541a.) The Revised Statutes authorize towns to establish a corporation by an election, provided they contain more than two hundred and less than ten thousand inhabitants. (Art. 506.) No definition of the word 'town' is given, and it follows we must take the word in its ordinary signification—a collection of inhabited houses. The term carries with it the idea of a considerable aggregation of people living in close proximity. A town population is distinguished from a rural population, which is understood to signify a people scattered over the country and engaged in agricultural pursuits or some similar avocation requiring a considerable area of territory for its support. A section of country so inhabited can not be called a town, nor treated as a part of a town, without doing violence to the meaning ordinarily attached to that word.

"It follows from this that the legislature did not intend to

confer the power of incorporating by election upon a district of country inhabited by people living in residences widely disseminated over its area. The power is conferred only upon towns and villages, and is confined to the actual residents of such localities, and does not carry with it and confer upon a town, authority to extend the boundaries of the corporation beyond its own actual limits."

Following the Eidson case is the case of State vs. Town of Baird reported in 79 Texas, 63, and from the opinion in that case we make the following extracts:

"It is insisted that the incorporation should have been confined to the town as laid off into blocks and lots. But we think otherwise. A town may exist without being divided into lots; and on the other hand, neither naked blocks or lots, whether with or without a map, constitute a town. If the population extended beyond the platted portion of the town, such extention was properly embraced within the limits of the incorporation."

"But as intimated in the State vs. Eidson, 76 Texas, 302, it may not always be practicable to incorporate a town without including within its limits some territory devoted purely to pastoral or agricultural pursuits. Something may be allowed for prospective expansion. In a case like that just cited (The State vs. Eidson), where there has been a clear abuse of the incorporating power conferred by the legislature, the courts should not hesitate to dissolve the alleged incorporation. But it would not do to annul such municipal corporation created by an election under the general law upon proof of the inclusion within its limits of a small strip of agricultural land. The effect of such ruling would probably be to annul the charters of many growing and thriving towns in the state which are acting as incorporations under the general laws,—a result it is to be presumed the legislature did not contemplate.

"In case of a clear abuse of the power to fix the corporation limits in an attempt to incorporate under the general law the courts should not hesitate to annul. But we do not

think such abuse has been shown in this case. Therefore we can not say that the court erred in holding under the facts in evidence that the town of Baird was legally incorporated.

"The judgment is affirmed."

In the case of Ewing vs. State, reported in 81 Texas, 172, the supreme court in construing the right of the petitioners to designate boundaries and fix the limits of the proposed corporation follow the case of State vs. Eidson, and we quote from the opinion found on page 177 the following:

"The corporation in the present case was attempted to be created under Article 340a of Sayles' Civil Statutes, which article reads as follows: 'When a city or town may contain 1000 inhabitants or over, it may incorporate as a city or town in the manner prescribed by chapter 2 of this title,' etc. It follows that the manner of incorporating towns and villages for school purposes, and for incorporating cities, towns and villages for municipal purposes, are precisely the same; and that if a town is not authorized to embrace within the limits of its corporation for school purposes territory beyond the limits of the actual town, a city when it seeks to create a corporation for municipal purposes must confine itself to its actual boundaries. This is the literal meaning of the statutes upon this subject. Who are empowered to create corporations? The inhabitants of cities, towns and villages. What are they empowered to incorporate? The cities, towns and villages themselves, and not also such portions of the adjacent territory as their inhabitants may be pleased to embrace within the limits of the corporation.

"But it is insisted that the boundaries of a municipal corporation is a question to be determined by the legislature and not by the courts. This may be true as to such municipalities as have been or may be established by special legislative enactments. It was so held by this court in Norris vs. The City of Waco, 57 Texas, 635. So also if the legisla-

ture had provided that the cities proposing to incorporate under the general laws should be empowered to embrace territory lying beyond their actual limits it may be that in the clear abuse of the power it would be the duty of the courts to respect the legislative will and to hold an incorporation including such additional territory valid. But as we construe the law no such power has been granted, and the question we have is, whether or not the action taken by the inhabitants of Oak Cliff in attempting to incorporate their city is such as the legislature empowered them to do or not. This is a judicial and not a legislative inquiry."

From the foregoing it will appear that the authorized construction by the Supreme Court of Texas, of the general incorporation laws of the state, limits and restricts the boundaries to such land as may be used by persons following urban pursuits and excludes such lands as are occupied by agriculturists. As held by the court in the Ewing case, those who seek to fix the boundaries act at their peril, and their action is not final. The question remains open for judicial inquiry by any person who feels himself aggrieved at being included within the proposed municipality.

We submit that the theory on which the case of People vs. Bennett, 29 Michigan, 451, was decided, has no application to the case at bar.

As pointed out *(supra)*, the Courts of the State of Texas hold that, under the general incorporation laws of that State, the inclusion of rural lands within the proposed boundaries of a municipality to be incorporated render the incorporation invalid.

State of Texas vs. Eidson, 76 Texas, 302.

While on this point we deem it proper to suggest the evil

consequences and far reaching effect of a decision by this court, after a statute has been in force for twenty-five years conferring the right of municipal incorporation, to hold such statute unconstitutional and strike down municipal governments formed thereunder. On this point we beg to suggest that in the report of the tax commission of the State of Texas created by Act of March 1, 1899, and which was composed of the governor, comptroller, state revenue agent and another commissioner, in Appendix B to their official report submitted to the legislature of the state in December, 1899, the bonded debts of 114 towns and cities incorporated under the general laws of the state are set forth and show such bonded indebtedness, so far as reported to them, to amount to $2,514,600.00. By way of explanation as to the above figures we will state that from the recapitulation found on page 372 of the report we have deducted the indebtedness of the ten cities having a population of 10,000 inhabitants or more and which are chartered by special acts. In addition to the evil to ensue from holding this indebtedness to be illegal, it is unnecessary to mention the great embarrassment and confusion that would follow the destruction of all municipal government in these smaller cities.

In the question of extension of boundaries as provided for in Article 503 copied on page 60 of the brief of plaintiff in error there have been two decisions rendered by the supreme court of Texas. The first case is that of Graham vs. Greenville, 67 Texas, 62, in which this article was sustained. This case was followed in State of Texas vs. Waxahachie, 81 Texas, 626, and it will be seen that under the second proposition in the brief for the state, that the point was made that the law providing for the incorporation of cities and towns was inoperative because the legislature had failed to provide any authority or mode for ascertaining or fixing the boundaries, and the case of People vs. Bennett, 19 Michigan, 451, was cited. The court without reviewing the question upholds the statute.

THIRD POINT.

have from and after the dates of their several attempted incorporations

Conceding the irregularity of the incorporation of the City of Lampasas by vote of the people in 1883, the same was cured by the validating act of the legislature of March 2 1891, and by the subsequent validating act of March 30 1895, and such corporation with the boundaries therein fixed became and now is a valid and subsisting municipality entitled to all property rights and privileges and charged with the payment of all obligations incurred by it prior to such validation.

The validating act of March 2nd, 1891, above referred to is as follows:

"Article 340c. That all towns and cities of one thousand inhabitants or more which have heretofore attempted to accept the provisions of this title and to become incorporated cities of one thousand inhabitants or more, under the general laws of Texas, and have failed to comply with all the requirements of said general law, or which are not included within the literal meaning of those cities which are authorized to accept the provisions of said general law, and all towns and villages incorporated under chapter 11 of the Revised Civil Statutes or by special charter or otherwise, but which now have one thousand inhabitants or more, and which have heretofore attempted to accept the provisions of this title in lieu of their said town or village charter and become incorporated cities of one thousand inhabitants or more; but which said cities and their several efforts to accept the provisions of this title exercised the functions of cities of the class named, and were by the State of Texas recognized as such cities, be and the same are hereby declared to be cities of one thousand inhabitants or more, and the several acts whereby they attempted to accept the provisions of said law are hereby in all things validated. And that all subsequent acts of said cities and towns done and performed as a city of one thousand inhabitants or more, after they had attempted to accept the provisions of said law as aforesaid, be and the same are hereby validated and declared to be as

binding as if said cities has been duly and legally incorporated, provided, that nothing herein shall be construed as validating any act of said cities or the councils thereof, unless same were authorized by the general laws of the state under which they were attempting to act, at the several dates when said acts were done, and provided further, that the provisions of this act shall not validate the act of any town or city in unlawfully adding additional territory to such town or city, without the consent of such inhabitants so added to said town or city.

"Sec. 2. Whereas there are many cities in Texas of one thousand inhabitants or more which have heretofore attempted to accept the provisions of the general law as stated in the preceding section of this article, and have attempted to incorporate themselves, but have failed to comply with the provisions thereof, but have nevertheless been recognized as cities, and have borrowed money, incurred debts, purchased property and levied taxes, built school houses and engaged in many different enterprises for the public good; and whereas the corporate existence of many of these cities is threatened by legal proceedings by which the creditors of said city would be without remedy, and the public interest greatly injured, therefore an emergency and an imperative public necessity exists for the suspension of the constitutional rule requiring bills to be read on three several days, and the same is hereby suspended and this act take effect from and after its passage and it is so enacted."

The validating act of March 30th, 1895, is as follows:

"Sec. 1. Be it enacted by the Legislature of the State of Texas: That all cities or towns of one thousand inhabitants or over which have heretofore attempted to accept the provisions of Chapter 1, Title 17, of the Revised Civil Statutes, and which have attemepted to be incorporated under the provisions of said general law, but which said attempted incorporation is invalid by reason of the failure of said cities or towns to comply with all the requirements of law relating to the incorporation of towns or

villages, but which said cities or towns have from and after the dates of their several efforts to accept the provisions of law relating to the incorporation of cities or towns of one thousand inhabitants or over, exercised the functions of cities or towns of the class named and been recognized as such cities or towns be and are hereby declared to be cities of one thousand inhabitants or over, and their incorporation as such is hereby in all things validated: Provided, that nothing in this act shall be held to validate the incorporation of cities or towns that had less than one thousand inhabitants at the time of their attempted incorporation as such cities or towns of one thousand inhabitants or over.

"Sec. 2. Whereas, there are many cities in Texas of one thousand inhabitants or more which have heretofore attempted to accept the provisions of the general law as stated in the preceding section and have attempted to incorporate themselves but have failed by reason of the failure of said cities to comply with all the requirements of law relating to the incorporation of towns and villages, but have nevertheless been recognized as cities and have borrowed money, incurred debts, purchased property and levied taxes, built school houses and engaged in many different enterprises for the public good; and whereas, the corporate existence of many of these cities is threatened by legal proceedings by which the creditors of said cities would be without remedy and the public interest greatly injured, therefore an emergency and an imperative public necessity exists for the suspension of the constitutional rule requiring bills to be read on three several days, and the same is hereby suspended, and this act take effect from and after its passage, and it is so enacted."

It will be observed that the first validating act above quoted was passed in 1891 which was at the first session of the legislature after the supreme court had in the Harness case (76 Tex. 562) suggested the necessity of some legislation upon the subject. It is worthy of note that the Harness

case was the third at the same term wherein municipal corporations were held to be invalid on mere technical grounds, and it is but natural to find the legislature coming to the rescue to avoid the wholesale repudiation of debts which was being attempted in this way. One of the three cases being the Largen case wherein the plaintiff in error sought to escape liability upon its debts by having its charter taken from it.

We therefore rely upon these validating acts as curing any vice or infirmity in the bonds sued upon.

FOURTH POINT.

As the citizens of the City of Lampasas had permitted the organization under the special charter of 1873 to lapse and to remain dormant from 1876 to 1883, the organization at last named date by vote of the people, created a de facto government in every respect regular except as to the method by which it was organized, and since the additional territory did not exceed in width the half mile permitted to be added under the term of the general charter, and this de facto organization being recognized by the state and permitted to issue negotiable bonds, and through its comptroller having registered the same, the state could not thereafter strike down such de facto municipality, without making provision for the payment of the debts incurred by it in good faith. We further submit that the judgment in the case of State vs. Largen, was not binding upon the defendant in error and other bond holders who were not made parties thereto.

The statement in the foregoing proposition that the additional territory embraced within the incorporation of 1883 did not exceed a half mile in width, is shown by the 7th finding of fact. Article 503 of the general charter, copied on page 60 of brief for plaintiff in error, permits territory to be added to any municipality to the extent of a half mile in width.

That defendant in error and other bond holders were not parties to the judgment in theLargen case is shown in the 9th finding. That such a judgment would not affect the rights of such bond holders, we cite the case of Morris vs. State, 65 Texas, 59, and New Orleans Water Works Company vs. New Orleans, 164 U. S., 471.

That the officers who were elected under the organization of 1883 were de facto officers of the City of Lampasas even if it be held that we must look alone to the charter of 1873, we cite the cases of State vs. Hoff, 88 Texas, 297, State vs. Goodwin, 69 Texas, 55.

That the principle of estoppel is applicable to a quo warranto proceeding instituted by the state to set aside a de facto corporation after it has incurred debts, we cite the cases of Railroad Company vs. Commissioners, 48 Kansas, 70; State of Wisconsin vs. Janesville Water Power Company, decided March 10, 1896, reported in 32 Lawyers' Reports Annotated, page 391; State of Iowa vs. City of Des Moines, decided January 21, 1896, found in 31 Lawyers' Reports Annotated, page 186; People vs. Alturas County, decided by the supreme court of Idaho, January 14, 1889, reported in 44 Lawyers' Reports Annotated, page 122; and Comanche County vs. Lewis, 133, U. S., page 198.

FIFTH POINT.

Since the bonds in suit were issued prior to the decision of the supreme court in the case of State vs. Dunson, 71 Texas, 65, which is the first case wherein the State of Texas attempted to strike down de facto municipal governments because of technical irregularities in the mode of their incorporation, we submit that this court should exercise its independent judgment as to the soundness of that line of decisions, and hold that the judgment in the Largen case can not be sustained, because of the fact that the state had recognized the City of Lampasas as incorporated in 1883, had permitted it to issue negotiable bonds which had been regis-

tered by its comptroller and circulated upon the markets, and was, therefore, estopped from questioning the validity of said municipal government, and that therefore the corporation, with the boundaries fixed in the charter of 1883, is a valid corporation at this time.

In view of the fact that the present officers of the City of Lampasas do not assume jurisdiction over a part of the territory embraced in the charter of 1883, we ask the court to pass upon this question for the purpose of finally settling the issue as to what property is chargeable with the payment of the bonds issued in payment for the waterworks contracted for by said city in 1885.

SIXTH POINT.

Since the charter of 1873 provided for a city government of the City of Lampasas, to be exercised by a mayor and board of aldermen, and provided for the creation of the office of city secretary, the office of treasurer was necessarily implied; and as the bonds sued upon were issued by the mayor and secretary of the City of Lampasas and purported to be the obligations of said city, and since the charter of 1873 provided that the city might construct waterworks and issue bonds to pay for the same, the purchaser of said bonds was not required to make inquiry as to the manner in which said officers were elected, but could rely upon the de facto character of such officers and hold the City of Lampasas under its charter of 1873.

Under the foregoing proposition we submit that the charter of 1873 provided for the office of mayor of the City of Lampasas, and also for the office of city secretary; therefore these two offices existed by creation of law. The office of treasurer is a necessary feature to all governments, and it was within the implied power of the city council to create such an office. But whether this be true or not as to the treasurer, all that was required of him in the matter of issuing bonds was to register the same in his office and to endorse

such registration on the bonds under section 5 of the ordinance, and there was nothing in the laws of the state requiring such treasurer to have any connection with the issuance of the bonds, and his action was therefore immaterial.

That the acts of a de facto city council bind a municipality, we cite Dillon on Municipal Corporations, 4th ed, section 276.

SEVENTH POINT.

Conceding the validity of the judgment of dissolution in the Largen case, the action of the City of Lampasas in reorganizing under its special charter and four days thereafter surrendering the same and adopting the general charter, and subsequently in December, 1890, extending its limits embracing substantially all of the persons and property covered by the incorporation of 1883 renders this reorganized corporation liable for the debts of the dissolved corporation including the bonds sued upon.

In support of the foregoing proposition we cite the case of Shapleigh vs. San Angelo, 167 U. S., 646, and to the case of City of Lampasas vs. Talcott, 94 Fed. Rep., page 457.

We deem it unnecessary to elaborate upon this point. The facts found to exist by the circuit court show that the business part of the City of Lampasas has at all times been with in the charter limits of 1873. The value of the real estate included within the present limits as shown by the tax rolls of 1889, constitute 90 per cent of the values of the entire city as organized under the charter of 1883. There is no division shown as to the proportion of personal property, and since the business part of the town was within the original limits it is certainly fair to say that fully 90 per cent of the personal property was situated within the present limits. Of the 438 voters shown upon the rolls of 1889, 342 out of the 438 resided within the present limits and 90 per cent of those living in the territory not covered by the present organiza-

tion, did business within the present limits. These facts are shown in the 14th finding and in the 28th finding. All of the improvements and property owned by the municipality of 1883, except about 900 yards of water pipe, are situated within the present city. We, therefore, submit that if the question is reviewable in this court, the finding of the circuit court that the present city embraces substantially all of the persons and property embraced within the limits of the city as it existed under the charter of 1883, is amply sustained, and therefore, the San Angelo case is directly in point.

EIGHTH POINT.

The fifth and sixth propositions of plaintiff in error raise no issue affecting the validity of the bonds and the right of the defendant in error to recover thereon. Under the law of the State of Texas the bonds were valid, if it be conceded that they were sold for less than their face value, and the ordinance requiring them to be sold at face value would not affect the subsequent action of the council in disposing of them directly for the system of waterworks. The defendant in error having shown affirmatively that he was a purchaser in good faith, any irregularity as to the manner in which the trade was made for a system of waterworks to be built to be paid for in bonds would not affect him.

The following are all of the statutory provisions bearing upon the issuance of municipal bonds which were in force at the time the bonds sued upon were issued. These extracts are from the Revised Statutes of Texas, of 1879, and are articles 421 to 424 inclusive.

"Art. 421. All bonds shall specify for what purpose they were issued and shall not be invalid if sold for less than their par value; and when any bonds are issued by the city a fund shall be provided to pay the interest and create a sinking fund to redeem the bonds, which fund shall not be diverted nor drawn upon for any other purpose, and the city treasurer shall honor no drafts on said fund except to pay inter-

est upon or redeem the bonds for which it was provided.

"Art. 422. Said bonds shall be signed by the mayor and countersigned by the secretary, and payable at such places and at such times as may be fixed by ordinance of the city council, not less than ten nor more than fifty years.

"Art. 423. It shall be the duty of the mayor, whenever any bond or bonds are issued, to forward the same to the comptroller of public accounts of the state, whose duty it shall be to register said bond or bonds in a book kept for that purpose, and to endorse on each bond so registered his certificate of registration and to give at the request of the mayor his certificate certifying to the amount of bonds so registered in his office up to date.

"Art 424. That it shall be the duty of the mayor, at the time of forwarding any of said bonds for registration, to furnish the comptroller with a statement of the value of all taxable property, real and personal, in the city; also with a statement of the amount of tax levied for the payment of interest and to create a sinking fund. It is hereby made the duty of the comptroller to see that a tax is levied and collected by the city sufficient to pay the interest semi-annually on all bonds issued, and to create a sinking fund sufficient to pay the said bonds at maturity, and that said sinking fund is invested in good interest-bearing securities."

From the foregoing it will be seen that the statute expressly provides the bonds shall not be invalid if sold for less than their par value. That the declaration in the ordinance that they should be sold at their par value would not bind the council in subsequently disposing of them, we cite the case of City of Waco vs. Chamberlain, 92 Texas, 213.

That all of the requirements of Articles 421 to 424 aforesaid were complied with is shown in the 23rd finding of the circuit court.

That the council after the adoption of the ordinance requiring the bonds to be sold for their face value, itself disposed of the bonds and made a contract directly to deliver

the same in payment for the system of water works, is shown in the twentieth finding of the circuit court.

That the failure of the comptroller to impress his official seal upon his certificate of registration does not affect the validity of the bonds, we cite Bernard Township *vs.* Stebbins, 109 U. S., 341; Draper *vs.* Springport, 104 U. S., 501; San Antonio *vs.* Mahaffey, 96 U. S., 312; Coler *vs.* City of Cleburne, 131 U. S., 165.

Ninth Point.

Counsel for the plaintiff in error contends that because the word registered does not appear anywhere upon the face of the bond, and especially does not appear in the upper left-hand corner, where the city secretary and city treasurer have signed their names, that therefore the city treasurer has not registered the bonds. We feel sure that this court will not concur in any such far-fetched and technical view. An examination of the bonds shows that at the place where it was proper for the treasurer to sign, his name is found affixed. An examination of sections 4 and 5 of the ordinance will show that this is all that is required of the treasurer. Section 5, it is true, uses the term that he shall "endorse the countersigning and registration thereof on each of said bonds." This language evidently means, however, that he is to countersign the bonds after he has registered them. The word "register" means to "record," to "enroll" (Standard Dictionary, volume 2). When the treasurer had, in accordance with section 5, made a record of the bonds, as the law will presume he did since all the records are lost, and then afterwards countersigned his name as he does by placing it in the upper left-hand corner in transverse form and separated from the body of the bond by vignette line, then certainly the ordinance has been fully complied with.

Article 423 of the Revised Statutes of Texas, in force at the time these bonds were issued, is:

"It shall be the duty of the mayor, whenever any bond or bonds are issued, to forward the same to the comptroller of public accounts of the State, whose duty it shall be to register said bond or bonds in a book kept for that purpose, and to indorse on each bond so registered his certificate of registration, and to give, at the request of the mayor, his certificate certifying to the amount of bonds so registered in his office up to date."

From the conclusions of fact above set out, it will be readily seen that the comptroller has registered the bonds in a book kept for that purpose, and this counsel concede, but they contend that the endorsement on the back of the bond, "Registered March 28, 1885, William J. Swain, comptroller," was not a compliance with the statute, because this certificate must be authenticated by his official seal. We have made a very careful examination of the cases and text books bearing upon this question, and we have yet to find the case where any court held that the mere failure of the comptroller or similar officer to affix the seal to his certificate of registration would invalidate or affect the bond in any manner whatever. The principal case relied on by the city is Anthony *vs.* Jasper County, 101 U. S., 693. The bonds under consideration in that case were issued at a time when it was required by the law of Missouri that before any bond, issued for any purpose whatever, shall obtain validity or be negotiated, such bond should be first presented to the State auditor, who was required to register the same in a book and to certify by endorsement on the bond that all the conditions of the laws have been complied with. The bonds issued by Jasper county and sued on by Anthony had no such certificate of the auditor, and the court held that, not having complied with this law, Anthony was not entitled to recover. Here, however, the bonds are certified to by the comptroller. The only question is, Are they void, he evidently, through inadvertence, having omitted his seal? It has been held by

the Supreme Court that where the issue of bonds is authorized the accidental omission of the seal cannot be set up as a defense (Bernard Township *vs.* Stebbins, 109 U. S., 341; Draper *vs.* Springport, 104 U. S., 501; San Antonio *vs.* Mahaffey, 96 U. S., 312).

In the cases cited by the city it was not the seal of the officer whose duty it was to register the bonds that was omitted, but the seal of the municipal corporation itself, which it will be at once perceived presents a very much stronger state of facts than at bar. It must also be borne in mind that at the time of the issuance of these bonds the law in Texas did not declare that the bonds should be invalid or not be susceptible of negotiation because of the failure on the part of the comptroller to register the name. No such conclusion can be put upon article 423, nor did the Texas law in force when the bonds were issued declare that bonds are valid only when the comptroller placed his seal thereon. It is well settled that where there are no negative words in the statute under which the official acts declaring or necessarily implying that the failure to affix the seal will render the instrument void that the omission of the officer to place his seal upon the bonds will in nowise defeat their enforceable validity. The bonds were marked "registered," as required by law. Surely the mistake to affix the seal, a requirement not mandatory, can have no effect whatever (Draper *vs.* Springport, 104 U. S., 501; U. S. *vs.* Linn, 15 Peters, 290).

Tenth Point.

In answer to the seventh proposition of plaintiff in error, we submit that the question as to overissue of the bonds cannot be raised in this case, for the reason that the only evidence as to the taxable values of the city of Lampasas for the year 1884 is shown in the twenty-third finding to be $1,447,200, and it will be seen that a tax of 25 cents on

each $100 in value would produce $3,618 annually, which is more than sufficient to pay the annual interest of 7 per cent. and the required sinking fund of 2 per cent. upon all the bonds sued upon for the first year, without considering the abatement necessary to be considered in fixing a proper basis for the entire term of fifty years during which the bonds had to run.

Eleventh Point.

In answer to the contention of the plaintiff in reference to the effect of the invalidating acts, it is submitted that the acts of March 2, 1891, and March 30, 1895, passed by the legislature of Texas, effectually cured the irregularity in the incorporation of Lampasas in 1883, and these acts made binding upon said city as it now exists the bonds issued in 1885.

The supreme court of Texas, in the Nolan County bond case, 83 Texas, 200, says:

"Where a contract, which a municipal corporation has attempted to create, is invalid merely for want of legislative power to create it, it can be made valid by a subsequent law."

To the same effect is the language of Judge Dillon:

"In general, however, the legislature may by subsequent act validate and confirm previous acts of the corporation otherwise invalid" (Dillon on Municipal Corporations, 4th ed., sec. 79).

The question then arises whether the validating acts above invoked apply to a municipality such as was Lampasas in 1883. Let us now briefly consider these acts, bearing in mind what we have already said, that the attempted incorporation in 1883 was irregular only by reason of the method adopted to cast off the charter of 1873, and that instead of the citizens voting, had the council

by resolution declared its purpose thereafter, that Lampasas should be a city under the organic charter law, there would have been no irregularity. It will be seen at a glance that the purpose of each act was to make valid that which, but for an informal defect, would have been originally legal. The validating act of 1891 evidently was the result of the ruling of the supreme court of Texas in the Buford, Dunson, Largen, Harness, and other cases already referred to, wherein corporations, having sought to come under the organic charter law in an irregular manner, had in good faith incurred obligations which in equity should be paid by them, and the State, through its legislature, came to their aid and legalized absolutely, what was presumed aforetime to be of doubtful validity, by reason of technical defect alone. This is evident from section 2 of the act of March 2, 1891, which recites that many cities of one thousand inhabitants or more have heretofore attempted to incorporate under the general law, but failed to comply with its provisions, yet have been recognized as cities, incurred debts, purchased property, and engaged in many enterprises for the public good, and in order that the rights of their creditors may not be jeopardized an imperative public necessity exists for putting in effect at once the law. To the same effect and in almost the same words is section 2 of the law of 1895.

Section 1 of the law of March 2, 1891, is certainly broad enough to include a municipality in the condition that Lampasas then was. That city had in 1883 "attempted to become an incorporated city of one thousand inhabitants or more under the general laws of Texas," and had "failed to comply with the requirements of said general law, and yet exercised the functions of a city of the class named and was by the State of Texas recognized as such, and hence the acts of that city after it had attempted to accept the provisions of the general law by the terms of the act now under consideration became "validated and as binding as if the city had been duly and regularly incorporated." An exam-

ination of the verbiage of the first section of the act of March 2, 1891, and likewise that of March 30, 1895, for both are almost the same, will disclose that it was the purpose of the legislature to validate the acts of every municipality of over 1,000 inhabitants, whatever may have been the irregularity by which it attempted to accept the provisions of the general law. Two things only were necessary: First, the city must have had 1,000 inhabitants or more; second, it must have attempted, but failed, to accept the provisions of the general charter act. The language of the first section of the act of March 2, 1891, is extremely broad, for it not only embraces cities of 1,000 inhabitants or more which had attempted to accept the provisions of the general charter act and had failed to comply with all the requirements of the general law, but likewise embraces all cities which are not "included within the literal meaning of those cities which were authorized to accept the provisions of the general law," and also of "towns and villages incorporated under chapter 11, title 17, of the Revised Civil Statutes" or "by special charter or otherwise." Language could not be broader nor could words have been used of more extended significance and meaning.

It will be noted that Lampasas further comes clearly within the proviso in the last part of this section of the act, to the effect "that nothing in the act shall be construed as validating any act of any city or its council unless the same was authorized by the general law of the State under which it was attempting to act at the several dates when the acts were done." At the time when the bonds were issued in 1885, article 374 of the Revised Statutes of 1879 was in effect, as follows:

"Art. 374. To provide, or cause to be provided, the city with water, to make, regulate and establish public wells, pumps and systems, hydrants and reservoirs in the streets or elsewhere in said city or beyond the limits thereof for the extinguishment of fires and the convenience of the inhabitants and to prevent the unnecessary waste of water."

Likewise, articles 420, 421, and 422, which are as follows:

"Art. 420. To appropriate so much of the revenues of the city, emanating from whatever source, for the purpose of retiring and discharging the accrued indebtedness of the city, and for the purpose of improving the public markets and streets, erecting and conducting city hospitals, city hall, water works, and so forth, as they may, from time to time, deem expedient, and in furtherance of these objects they shall have power to borrow money upon the credit of the city, and issue coupon bonds of the city therefor, in such sum or sums as they may deem expedient, to bear interest not exceeding ten per cent. per annum, payable semi-annually, at such place as may be fixed by city ordinance; provided, that the aggregate amount of bonds issued by the city council shall, at no time, exceed six per cent. of the value of the property within said city subject to ad valorem tax.

"Art. 421. All bonds shall specify for what purpose they were issued, and shall not be invalid if sold for less than their par value; and when any bonds are issued by the city a fund shall be provided to pay the interest and create a sinking fund to redeem the bonds, which fund shall not be diverted nor drawn upon for any other purpose, and the city treasurer shall honor no drafts on said fund except to pay interest upon, or redeem the bonds for which it was provided.

"Art. 422. Said bonds shall be signed by the mayor and countersigned by the secretary, and payable at such places and at such times as may be fixed by ordinance of the city council, not less than ten nor more than fifty years."

Hence it will be seen that what the City of Lampasas did in the matter of the issuance of these bonds was clearly within the provisions of the general charter act. It was the evident purpose of the legislature, therefore, to validate the acts of every city of 1,000 inhabitants and over, and hence does Lampasas come clearly within these validating statutes.

Twelfth Point.

The defendant in error, in further answer to the second proposition of the plaintiff in error, respectfully submits that the contention therein made, that the case at bar is to be distinguished from Shapleigh *vs.* San Angelo (167 U. S., 646), is erroneous.

This contention is based upon the claim that in the case at bar the attempted incorporation was void *ab initio* because of the pre-existing charter of 1873, the jurisdiction under which covered a portion of the territory included in the incorporation proceedings of 1883.

In *Shapleigh vs. San Angelo* the situation was, as stated in the opinion of this court, as follows:

"In January, 1889, the city of San Angelo was existing and acting as an organized municipal corporation, with a mayor, a board of aldermen and other functionaries. In pursuance of an ordinance of the city council in May, 1889, there were issued the bonds in question in this case." It was not denied that the proceedings were regular in form, that the bonds were duly executed and registered as required by law, that the proceeds of their sale were properly applied to improving the streets and public highways of the city, and that the plaintiff was a *bona fide* holder for value.

"As things then stood, it is plain that the city could not have set up to defeat its obligations any supposed irregularity or illegality in its organization. The State, being the creator of municipal corporations, is the proper party to impeach the validity of their creation. If the State acquiesces in the validity of a municipal corporation, its corporate existence cannot be collaterally attacked.

"This is the general rule, and it is recognized in Texas: 'If a municipality has been illegally constituted, the State alone can take advantage of the fact in a proper proceeding instituted for the purpose of testing the validity of its charter' (*Graham vs. City of Greenville*, 67 Texas, 62).

"But, in 1890, at the fall term of the district court of Tom Green county, an information was filed by the county attorney against named persons, who were exercising and per-

forming the duties, privileges and functions of a mayor and city council of the city of San Angelo, claiming the same to be a city duly and legally incorporated under the laws of the State, and alleging that said city was not legally incorporated, and that said named persons were unlawfully exercising said functions. Such proceedings were had that on December 15, 1891, the said district court entered a decree ousting the said persons from their said offices, and adjudging that the incorporation of the said city of San Angelo be, and the same was thereby, abolished and declared to be null and void. The record does not distinctly disclose the ground upon which the court proceeded in disincorporating said city, but enough appears to justify the inference that the incorporation included within its limits unimproved pasture lands, outside of the territory actually inhabited, and that the incorporation was declared invalid for that reason.

Shapleigh *vs.* Angelo, 167 U. S., 646.

While in the case of the city of Lampasas it was held that because of the existence of the old charter (which it had been assumed by the residents of the territory covered by it had been annulled seven years before) the statute required that before the inhabitants of such territory could be incorporated under the general law it was necessary that the city council should meet and pass a resolution to that effect, and that because this had not been done and because, as stated by the court in the Largen case, "the incorporation in 1883 was attempted through an election held by the county judge on application of fifty persons resident within the territory desired to be embraced within the limits of the proposed incorporation as is provided may be done in case of incorporation of a city or town not before incorporated,' the incorporation was held to have been illegal.

All that was done in the Largen case was to grant a judgment of ouster against the officers as not legally entitled to hold their offices.

Largen vs. State, 76 Texas, 567.

Indeed, the Lampasas City case is stronger than the San Angelo case because, in the former, all the territory sought to be incorporated could lawfully be included in an incorporation under the general laws, and the only illegality was in the method by which it was sought to be accomplished, while in the San Angelo case a part of the territory sought to be incorporated could not be lawfully included within the corporate limits there proposed for the reason that such portion was rural land the inclusion of which rendered the incorporation void.

The counsel for the city cite in support of their view decisions of the supreme court of Texas (*Duncan vs. State*, 71 Texas, 65; *Nacodoches* case; *Buford vs. State*, 72 Texas, 182; *Henderson* case; *Largen vs. State*, 76 Texas, 323; *Lampasas* case; *Harness vs. State*, 76 Texas, 567; *Colorado* case; *Lum vs. Bowie*, 18 S. W., 142). These cases all in effect hold that certain attempted incorporations were invalid either because, as in the cases of the cities of Nacodoches, Henderson, and Lampasas, there was in existence a previous incorporation, or, as in the cases of Colorado and Bowie, like San Angelo (Shapleigh case) and Uvalde (Spier case, 91 F. R., 594), the attempted incorporation was in violation of the organic charter law of the State. They merely hold that the persons who have assumed to act as officers were not legally such, but none of them question the binding force of the acts of such persons who assume to be officers, have the reputation of being such, have been recognized by the inhabitants of the real corporate entity as such and likewise by the State authorities, and whose acts have been acquiesced in for a long period of time. Indeed, the supreme court of Texas has always followed the definition given by Lord Ellenborough in *Rex vs. Belford* (6 East., 26), quoted with approval by Judge Butler (*State vs. Carroll*, 38 Conn., 449), to the effect that a *de facto* officer "is one who has the reputation of being the officer he assumes to be, and yet not a good officer in point of law." (See *Land Co. vs. Laigle*, 59

Texas, 344; *McKinney vs. O'Connor*, 26 Texas, 14; *State vs. Hoff*, 29 S. W., 674.)

Nor is there anything in the case of *Walsh vs. St. Genevieve*, 1st Dillon, 130, nor in *De Corah vs. Bullis*, 25 Iowa, 12 which in any way, if carefully examined and analyzed with reference to the facts of this case, decides to the contrary, and so as to the other cases cited on this point.

These cases were not cases where creditors had relied upon the acts of officers of *de facto* corporations. Indeed, what would be the rule under the facts presented in the case at bar is expressly reserved from decision in *De Corah vs. Bullis*, 25 Iowa, 12, at page 18.

Thirteenth Point.

The plaintiff in error is estopped from questioning the acts of the officers of the *de facto* corporation in issuing the bonds.

As the corporation of 1873 is held by the supreme court of the State of Texas to have been in existence when the bonds were issued, and it is shown that all residents within its territory acquiesced in the acts of the incorporation of 1883 and received benefits from the issue of the bonds, it is estopped, it is submitted, from questioning their validity or from claiming that the officers of the incorporation of 1883 were not *de facto* officers with power to bind it.

In Moran *vs.* County of Miami, 67 U. S., 2 Black, 722, said this Court, in upholding the claim of a *bona fide* holder of municipal bonds (at p. 723):

"We repeat now, as appropriate to the subject-matter of the case in hand, as it was in the case in which this court said it, that corporations are as strongly bound as individuals are to a careful adherence to truth in their dealings with mankind, and that they cannot by their representations or *silence* involve others in onerous engagements and thus defeat

the calculations and claims their own conduct had superinduced."

Moran *vs.* County of Miami, 67 U. S., 2 Black, 722.

Said Lord Denman, C. J., in the leading case of Picard *vs.* Sears, 6 Ad. & E., 469, at page 474:

"The rule of law is clear that where one by his words or conduct causes another to believe the existence of a certain state of things, and induces him to act in that belief so as to alter his own former position, the former is concluded from averring against the latter a different state of things as existing at the same time."

Picard *vs.* Sears, 6 Ad. & E., 469.

Says Bigelow on Estoppel, page 560, referring to the above case:

"In accordance with this case, it is now a well-established principle that where the true owner of property for however short a time holds out another, or allows another to appear, as the owner of or as having full power of disposition over the property, the same being in the latter's actual possession, and innocent third parties are thus led into dealings with such apparent owner, they will be protected. Or where others are innocently induced to acquire rights in derogation of the secret or undisclosed claims of those who cause such action, the rights so acquired are secure whether contested at law or in equity. Such rights do not depend upon the actual title or rights or authority of the party with whom they have directly dealt, but are derived from conduct of the real owner which precludes him from disputing against them the existence of the title or right or power which he caused or allowed to appear to be vested in the party making the sale."

Bigelow on Estoppel, p. 560.

Says Lord Campbell:

"If a man either by words or by conduct has intimated that he consents to an act which has been done and that he will offer no opposition to it although it could not have been lawfully done without his consent, and he thereby in-

duces others to do that from which they would otherwise have abstained, he cannot question the legality of the act he has so sanctioned to the prejudice of those who have given faith to his words or other fair inference to be drawn from his conduct."

Cairncross *v.* Lorimer, 3 Macq. Appeal Cases, 827.

It is submitted that the application of the above rule to the case at bar precludes the plaintiff in error from questioning the validity of the acts of the officers of the incorporation of 1883. Moreover, it is held in Shapleigh *vs.* San Angelo that a State, being the creator of municipal organizations, is the proper party to impeach the validity of their creations, and if it acquiesces in the validity of a municipal corporation the corporate existence thereof cannot be collaterally attacked. Says Mr. Justice Shiras:

"The conclusion which is derivable from the authorities cited and from the principles therein established, is that the disincorporation by legal proceedings of the city of San Angelo did not avoid legally subsisting contracts, and that upon the reincorporation of the same inhabitants and of a territory inclusive of the improvements made under such contracts, the obligation of the old devolved upon the new corporation."

Shapleigh *vs.* San Angelo, 167 U. S. Reports, p. 655.

Says the court in the case last cited:

"In Mobile *vs.* Watson, 116 U. S., 289, it was held that when a municipal corporation with fixed boundaries is dissolved by law and a new corporation is created by the legislature for the same general purposes, but with new boundaries embracing less territory but containing substantially the same population, the great mass of the taxable property and the corporate property of the old corporation which passes without consideration and for the same uses, the debts of the old corporation fall upon the new as its legal successor and that powers of taxation to pay them which it had at the time of their creation and which entered into the contracts also survive and pass into the new corporation."

It is found as a fact by the court below (page 36 of the record)—

"That within the city of Lampasas, as now organized, and as it has existed since 1890, there is embraced substantially all of the persons and property embraced within the limits of said city as it existed under the charter adopted in 1883 by vote of the people and which was recognized and acted upon by them as a valid city government from its adoption until the *quo warranto* proceedings against Largen and his associate officers in 1889, during which time the officers assumed to act as officers under said general charter, were elected in good faith by all persons residing within the limits of the charter of 1883, and as such officers in good faith discharged the duties of their respective offices without dispute by any person residing within the restricted limits of the charter of 1873 or by persons living outside of the same."

It follows from the application of the above rules of law to the facts so found, it is submitted, that the plaintiff in error is liable to the defendant in error for the amount of the judgment rendered against it in the court below, and that such judgment should therefore be affirmed.

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